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Nos. 1189 and 1190

# In the Supreme Court of the United States

OCTOBER TERM, 1944

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DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. AND DIAMOND TRADING COMPANY, LTD., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO AND COMPANHIA DE DIAMANTES DE ANGOLA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF N. W YORK*

---

**BRIEF FOR THE UNITED STATES**

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## BRIEF FOR THE UNITED STATES

---

### OPINION BELOW

The opinion of the district court (R. 97)[1] has not yet been reported.

[1] The designation "R." will be used to refer to the record filed by Societe Internationale, etc., Du Congo and its co-

## JURISDICTION

The order of the district court sought to be reviewed was entered on April 3, 1945 (R. 99). Motions for leave to file petitions for writs of certiorari and petitions for writs of certiorari were filed in No. 1189 on April 5, 1945, and in No. 1190 on April 6, 1945. The jurisdiction of this Court is invoked under Section 262 of the Judicial Code, 28 U. S. C. sec. 377.

On April 23, 1945, this Court granted the motions and petitions and requested counsel to discuss in their briefs and upon oral argument the "question whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by writ of certiorari under section 262 of the Judicial Code".

## QUESTIONS PRESENTED

(1) Whether the order of the district court granting a preliminary injunction restraining the removal or other disposition of certain of petitioners' domestic assets may appropriately be reviewed by this Court at the present stage of the proceedings by writ of certiorari under Section 262 of the Judicial Code.

(2) Whether the district court was authorized by Section 4 of the Sherman Act, Section 262 of

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petitioner, and the designation "DB" to refer to the record filed by De Beers Consolidated Mines, Ltd., and its co-petitioners. As to matters common to both records, reference will be made to the former record.

the Judicial Code and its inherent equity power to enter the order as a necessary means of retaining its power to enforce its final decree by sequestration under Rule 70 of the Rules of Civil Procedure; and, if so authorized, whether the entry of the order was an abuse of discretion when it appeared that it was necessary to protect the Government from irreparable injury through loss of the right to effective relief and inconvenience to petitioners was slight.

## STATUTES INVOLVED

Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, commonly known as the Sherman Act, 15 U. S. C. secs. 1, 2, 4, provide in part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Section 73 of the Act of August 27, 1894, 28 Stat. 509, as amended, commonly known as the Wilson Tariff Act, 15 U. S. C. sec. 8, provides in part:

SEC. 73. Every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported articles enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any

> commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, * * *.

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, provides in part:

> * * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. sec. 29, provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[2] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court * * *.

## STATEMENT

On January 29, 1940, the United States filed a civil action seeking equitable relief against nine foreign corporations and seven individuals charged with having long engaged in a conspiracy to

[2] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds in violation of Sections 1 and 2 of the Sherman Act (R. 6–9, 12). The defendants were also charged with conspiring to restrain free competition in trade of the United States and to increase the market price in this country of imported diamonds, in violation of Section 73 of the Act of August 27, 1894, 15 U. S. C. sec. 8, known as the Wilson Tariff Act (R. 12).

The complaint alleges *inter alia:* The defendant corporations and their subsidiaries produce and sell approximately 95% of all the diamonds produced in the world (R. 11),[3] the principal market[4] for diamonds is in the United States, to which country the exports in 1942 and 1943 were greater than the total world production of diamonds in these years, *ibid.*; the primary purpose of the defendants is to maintain the prices of diamonds sold in or for export to the United States (R. 21–22); the defendants have controlled marketing of diamonds in the United States principally by causing all diamonds produced in Africa to be sold through a single selling

[3] Substantially all diamonds are produced in Africa, the most important producing areas being the Belgian Congo, Portuguese Angola, and the Union of South Africa (R. 10). The Belgian Congo is the principal source of industrial diamonds (R. 7).

[4] Industrial diamonds are an essential industrial material (R. 9–10).

agency (R. 13); defendants have furthered their purpose of maintaining prices on diamonds sold in or for export to the United States by numerous acts done in this country, many of which are alleged in specific detail in the complaint (R. 22); each corporate defendant has for many years transacted business in the southern district of New York and is found therein (R. 6); their combination has consisted of continuing agreement:

> (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject to terms and conditions set by defendants, (c) to prevent all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States (R. 12–13).

It is further alleged that as a result of defendants' acts dealers in diamonds in the United States are dealt with oppressively and monopolistic and exorbitant prices are maintained on all diamonds sold to the United States market

(R. 25–26). The complaint prays cancellation of the exclusive sales agreements insofar as they operate to restrain imports into the United States and an injunction against their renewal. The complaint also includes a prayer for an order enjoining the corporate defendants from withdrawing from the United States, or disposing of, assets then within the United States, until such time as the court shall have determined the issues and the corporate defendants shall have complied with its orders (R. 26–27).

The United States filed with the complaint an application for a temporary restraining order so enjoining withdrawal or disposal by the corporate defendants of their assets then within the United States (R. 28–29) and a motion for a preliminary injunction of the same scope and effect (R. 34). The temporary restraining order was granted (R. 30–31).[8] Argument on motion for a preliminary injunction was postponed until March 2, 1945, at the request of defense counsel (R. 40, 42, 43, 51), and the court on March 28, 1945, rendered its opinion granting the motion (R. 97) and on April 3, 1945, entered its order (R. 99).

The court held that under Section 4 of the Sherman Act and Section 262 of the Judicial

[8] The restraining order was continued and modified in various ways to accommodate the business needs of the defendants (R. 35, 37–38, 41, 43, 51–53, 68–70, 75).

Code it had power to issue the requested injunction (R. 97–98, 100). On the question of exercise of this discretionary power, the court concluded from the facts appearing in the verified complaint and in the affidavits supporting and opposing the Government's motion, that if injunction should not issue the corporate defendants "would in all probability" "quickly withdraw their assets from the United States," in which event "there would be no way to enforce" the court's decree if the Government should prevail (R. 100, 98). The court further found that the resulting damage to the Government "would be incomparably greater" than any damage to the corporate defendants from the preliminary injunction (R. 100, 98). These conclusions of fact are set forth in the court's opinion and are stated as findings of fact in the order granting the injunction (R. 100).

After the district court entered the preliminary injunction, motions for leave to file petitions for writs of certiorari under Section 262 of the Judicial Code to review the district court's order were filed in this Court by certain of the corporate defendants.[6] The petitions for certiorari were granted.

[6] Petitioners in No. 1189 are De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd., and petitioners in No. 1190 are Societe Internationale Forestiere et Miniere du Congo and Companhia de Diamantes de Angola.

## SUMMARY OF ARGUMENT

### I

The Expediting Act permits appeal, in civil proceedings brought by the United States under the Sherman Act, only from the district court's "final" decree. Use of one of the extraordinary remedies authorized by Section 262 of the Judicial Code to review an interlocutory decree in such a proceeding would impair the rule laid down by Congress and the policy which that rule serves. In like situations this Court has consistently held that the remedies given by Section 262 may not be employed where their effect would be to thwart the Congressional policy against piecemeal appeals.

In the instant case the question whether the district court exceeded the limits of its judicial discretion in granting the preliminary injunction is not of public importance. Nor is the question of the court's power to grant the injunction of such public importance as to warrant present intervention in the cause by this Court, in circumvention of prescribed appellate procedure. And petitioners make no showing that immediate review is necessary to prevent exceptional hardship or burden.

### II

The district courts are empowered to issue preliminary injunctions to protect and preserve their jurisdiction. That jurisdiction extends beyond

the entry of a judgment to its enforcement. This Court has sanctioned a preliminary injunction to enjoin the transfer or disposition of assets as a means of insuring the plaintiff satisfaction of a final adjudication on a claim for money. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. An injunction to insure plaintiff of compliance by the defendant with a final decree requiring affirmative acts involves the same principle. A persuasive analogy for such an injunction when issued to prevent non-compliance by a corporation through flight from the jurisdiction is found in the writ of *ne exeat*. Rule 64 of the Rules of Civil Procedure does not govern the issuance of such an injunction, but if it did, the injunction would be authorized under New York laws.

The issuance of the preliminary injunction in this case was not an abuse of the court's discretion. It was necessary in order to enable the court to afford the Government the relief which it seeks and its burden upon the petitioners is insignificant.

## ARGUMENT

### I

### THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT MAY NOT BE APPROPRIATELY REVIEWED AT THE PRESENT STAGE OF THE PROCEEDINGS BY WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE

Normally preliminary injunctions granted by district courts are reviewable by the circuit courts

of appeals under Section 129 of the Judicial Code, 28 U. S. C. sec. 227, and their final judgments are reviewable by circuit courts of appeals under Section 128 of the Judicial Code, 28 U. S. C. sec. 225. With reference to the change made by the Expediting Act, this Court said in *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree.[7]

This rule and the policy it serves would be impaired if review of an interlocutory decree entered in a civil proceeding brought by the Government under the Sherman Act may be obtained by means of a writ from this Court under Section 262 of the Judicial Code. The grant of such a writ under these circumstances would also be in conflict with a more general policy. From the

[7] See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142–143.

time of Chief Justice Marshall to the present day this Court has firmly set its face against use of the extraordinary remedies authorized by Section 262 to bring up for review interlocutory rulings in proceedings as to which Congress has permitted appeals only from final judgments. To do so would be to "thwart the Congressional policy against piecemeal appeals" and would be a "plain evasion" of the mandate of Congress that appellate review be confined to final judgments. *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 30, and cases cited at pp. 30–31; *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569.

This is not a case where the ruling of the inferior court had the effect of preventing adjudication of the cause pending before it and therefore thwarted or tended to thwart appellate review. See *Ex parte United States*, 287 U. S. 241; *Whitney* v. *Dick*, 202 U. S. 132. Nor is it a case in which the action of the district court in denying a foreign Government's claim of immunity, which the political branch of our Government had supported, might endanger the conduct of our foreign relations, so that prompt appellate review was of "public importance." *Ex parte Peru*, 318 U. S. 578.

It is doubtful whether it would ever be appropriate to employ any of the extraordinary remedies authorized by Section 262 to review the

question whether an inferior court had, in a matter calling for the exercise of judicial discretion, improperly exercised its discretion.* Certainly the remedy would be appropriate only if there had been a gross abuse of discretion or a plain miscarriage of justice. Upon the facts of the present case, the action of the district court, in granting the preliminary injunction, was well within the range of judicial discretion. Upon balancing (1) the injury to the Government to be anticipated from a withdrawal of assets which might defeat the effectiveness of any decree issued in the cause and (2) the injury to the petitioners caused by the preliminary injunction, it is clearly permissible to conclude that the balance lies in favor of granting the requested injunction. The actual burden imposed upon the defendants is no more than the cost of procuring a bond so conditioned as to protect the United States against the consequences of lifting the restraints of the present preliminary injunction.**

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*The basis of the ruling in *Ex parte United States*, 287 U. S. 241, was that the act which the district court had erroneously failed to perform was not discretionary but ministerial.

**The condition of such a bond might be that if a final decree on the merits be entered against petitioners, and if they shall fail to perform acts required of them by the decree, and if upon the issuance of sequestration for contempt under Rule 70 of the Rules of Civil Procedure they shall be found without goods or funds within the jurisdiction in the amount as to which they are now restrained by the preliminary injunction, the difference shall be paid into court.

The question of the power of the district court to grant the preliminary injunction does not, we submit, raise a question of public importance or one which would make it appropriate for this Court to intervene by a writ under Section 262 notwithstanding the resulting circumvention of the appellate procedure prescribed by Congress. This case does not involve, as do the export association cases (Nos. 1016, 1017, this Term), a question of the respective jurisdictions of the federal district courts and a governmental agency, determination of which in favor of the petitioners in those cases would terminate the litigation. Even in the export association cases this Court appears to be in doubt as to the appropriateness of reviewing an interlocutory ruling in a Sherman Act proceeding by a writ under Section 262; the Court in granting the writs requested counsel to discuss this question in their briefs and on oral argument.

Even if the district court exceeded its power in granting the preliminary injunction it does not follow that immediate correction of the error is of public importance. Those adversely affected are private parties.[10] The injury suffered through

[10] While it appears that a foreign government owns stock in one of the petitioners (R. 84) such a financial interest does not make the corporate defendant any less a private party. An affidavit filed by the Government states that the stock so held by the foreign government is non-voting stock (R. 54).

delay in rectifying the error until appeal can be taken from final judgment—the cost of furnishing an appropriate bond—would seem far less burdensome than the necessity of standing trial in a complicated litigation where the trial court has erroneously overruled a demurrer to the complaint or indictment. But this Court, in holding that such burden does not furnish ground for correction by a writ under Section 262, has said that it "is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."—*Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30.

If certiorari should be granted both in the export association cases and in the present cases this Court is likely to be confronted with a flood of applications for writs to review interlocutory rulings by district courts in proceedings under the Sherman Act. The question of where the line is to be drawn between review and non-review by means of the extraordinary remedies authorized by Section 262 will, it would seem, have to be fought over in many cases.

## II

## THE DISTRICT COURT POSSESSED THE POWER TO ISSUE THE PRELIMINARY INJUNCTION IN ORDER TO PROTECT ITS JURISDICTION, AND ITS ISSUANCE TO PREVENT IRREPARABLE INJURY TO THE PLAINTIFF WAS NOT AN ABUSE OF ITS DISCRETIONARY POWER

### A. THE DISTRICT COURT WAS AUTHORIZED BY SECTION 4 OF THE SHERMAN ACT, SECTION 262 OF THE JUDICIAL CODE, AND ITS INHERENT EQUITY POWER TO GRANT THE PRELIMINARY INJUCTION IN ORDER TO RETAIN ITS POWER TO ENFORCE ITS FINAL DECREE BY SEQUESTRATION UNDER RULE 70 OF THE RULES OF CIVIL PROCEDURE

Section 4 of the Sherman Act invests the district courts with jurisdiction to prevent and restrain violations of that Act. The exercise of this jurisdiction is confronted with practical obstacles when the defendants are foreign corporations, controlled abroad, with their principal officers, substantially all of their capital, and all of their producing facilities located in foreign countries. In that situation, the only method of securing their compliance with any decree is through sequestration of their assets, under Rule 70, for refusal to comply with a final decree in favor of the Government. If such a foreign corporation, subject to the court's jurisdiction, should announce its intention to withdraw all of its assets deliberately to de-

prive the court of its power to enforce its decree, is the court powerless to interfere? Petitioners' position necessarily requires an affirmative answer.

Section 4 authorizes proceedings "in equity" [11] and provides that the court may at any time before final decree "make such temporary restraining order or prohibition as shall be deemed just in the premises." In equity cases the federal courts possess the general powers of courts of chancery. *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164; *Fitch* v. *Creighton*, 24 How. 159, 162–163; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 43–44; *Irvine* v. *Marshall*, 20 How. 558, 564–565. In addition, they possess the power, conferred upon them by Section 262 of the Judicial Code, to issue all writs not specifically provided for by statute which may be necessary for the exercise of their jurisdiction and agreeable to the usages and principles of law.

A district court may, in the exercise of these powers, issue a preliminary injunction to protect and preserve its jurisdiction. *Looney* v. *Eastern Texas Railroad Company*, 247 U. S. 214; *Kline* v. *Burke Construction Co.*, 260 U. S. 226. Such an injunction may prohibit acts by a defendant which would prevent the court from awarding upon final adjudication the complete relief to which the plaintiff is entitled. In *Looney* v.

[11] In *Swift & Co.* v. *United States*, 276 U. S. 311, 325, the Court said of a suit by the Government under Section 4 that it could be brought only in a court of equity.

*Eastern Texas Railroad Company, supra,* a suit by certain railroads to enjoin the Attorney General of Texas from instituting suits against them for complying with an order of the Interstate Commerce Commission, the Court said that the issuance of a preliminary injunction restraining such suits "for the purpose of protecting and preserving" an acquired "jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice" (p. 221). In *Ohio Oil Company* v. *Conway,* 279 U. S. 813, a suit to enjoin the collection of taxes imposed by an allegedly unconstitutional statute, it was held error to refuse a preliminary injunction enjoining collection of taxes when it appeared that there could be no recovery of taxes collected or paid under protest.

Such an injunction may also prohibit acts which would prevent a plaintiff from obtaining the full relief awarded by the final adjudication of the court—and the injunction may take the form of enjoining the transfer or disposition of assets. *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282. In that case a suit in equity was brought against an insolvent vendor of securities and a third party having in its possession assets belonging to the vendor. The suit sought rescission of a sale of securities on the ground of fraud, restitution of the consideration paid, and the enforcement of the right to restitution against the vendor's debtor. This Court found no error

in the issuance of a preliminary injunction restraining the vendor's debtor from transferring or disposing of any of the assets of the vendor, in order that the plaintiff's remedy might not be frustrated. It said (p. 290) that "the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill."

The jurisdiction of the district court extends beyond the entry of a decree to its enforcement and the power found in the cases referred to must extend to the issuance of an injunction designed to protect that jurisdiction. A persuasive analogy is found in the power to issue the writ of *ne exeat*, a writ developed in chancery (*Bushnell* v. *Bushnell*, 15 Barb. (N. Y.) 399) "to secure the presence of the party in order that the judgment may be executed,—in order that he may not be able to evade it." *Lewis* v. *Shainwald*, 48 Fed. 492, 499–500 (C. C. Cal.); *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *In re Lipke*, 98 Fed. 970 (D. C. S. D. N. Y.). Its use has been sanctioned not only where the proceeding was for the enforcement of a pecuniary claim, but also where the suit sought performance by defendants of specific acts. Gibson's *Suits in Chancery* (1907), Section 865. *Palmer* v. *Palmer*, 84 N. J. Eq. 550. In practice the defendant was relieved from the prohibitions of the writ by giving a bond "to render himself amenable to the process of the court, which may be issued to enforce the performance of the

decree." *Mitchell* v. *Bunch*, 2 Paige 606, 617. The purpose of the injunction of the court below, like that of the writ of *ne exeat*, was to protect the plaintiff against loss of remedy through flight of the foreign corporate defendants. That flight can be prevented in no other way than enjoining the removal of their assets. At a time when a substantial part of the foreign and domestic commerce of the United States is conducted by foreign corporations, equity should mould its historic remedies to meet modern conditions.

Petitioners cite no decision of this Court denying the existence of power to issue the challenged injunction. The decisions of the lower federal courts referred to hold only that the circumstances were not such as to warrant the issuance of injunctions against individuals. *Wahlgren* v. *Bausch & Lomb Optical Company*, 77 F. 2d 121 (C. C. A. 7); *Guth* v. *Groves*, 44 F. Supp. 851 (D. C. S. D. N. Y.). A more pertinent lower court decision is *Zenith Carburetor Co.* v. *Stromberg Motor Devices Co.*, 270 Fed. 421 (C. C. A. 7). In this case a suit was brought against the domestic subsidiary of a French corporation to enjoin patent infringement and for an accounting. The court after finding infringement referred the case to a master for the determination of damages. On application of the plaintiff, pending the proceedings before the master, the court granted an injunction prohibiting the defendant from disposing of its assets by sending money beyond the

jurisdiction of the court or sending assets to the French parent corporation. On appeal, the Court of Appeals in approving a modified injunction, expressly overruled the contention that the district court lacked power to enjoin the transfer of assets.

Petitioners challenge the power of the court below on several other grounds:

1. Petitioners assert it to be "settled law" that the injunctive relief provided by Section 4 of the Sherman Act must be confined to injunctions "to prevent and restrain" violations of the antitrust laws. This assertion is not even remotely supported by the decisions which they cite (De Beers pet. 17) and is contrary to the decisions of this Court. Section 4 does not specifically authorize an injunction against payment or collection of dividends but such an injunction was held authorized in *Northern Securities Co.* v. *United States*, 193 U. S. 197. Section 4 does not in terms authorize a district court to enjoin one who has violated the Act from engaging in *any* interstate commerce, but this Court has held that such an injunction could and should be entered if necessary or convenient in order to make the relief decreed by the Court effective. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188. If to make a decree effective, a district court may enter such injunctions, the power to grant a preliminary injunction may be so exercised as to enable the Court to enter an effective final decree.

2. Petitioners contend (1) that the injunction is an attachment, (2) that under Rule 64 of the Rules of Civil Procedure the remedy of attachment is authorized only as provided by State law, and (3) that New York law does not permit attachment in an equity proceeding. The Government's answer to these contentions is that the injunction granted in this case is not an attachment and is not governed by Rule 64.

Rule 64 makes available in the federal courts remedies given by State law providing for "seizure" of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered. The injunction granted in the present case operates strictly *in personam* against petitioners (R. 100–101). It is not a seizure of their property or an *in rem* proceeding against it. If the district court subsequently determines that it does not have personal jurisdiction over any petitioner, such petitioner will be free from the restraint of the injunction. The injunction, in other words, has none of the characteristics of an *in rem* seizure of property given by the remedy of attachment dealt with in Rule 64. Rule 64 is not a limitation upon the injunctive powers of district courts. Its purpose was to expand the remedies of seizure which federal district courts might exercise in proceedings at law. See Notes of Advisory Committee on Rules relating to Rule 64 and the predecessor of Rule 64, Sec. 915 of the Revised Statutes, 28 U. S. C. sec.

727. The flexible injunctive powers of a court of equity have never been cribbed or confined within the boundaries of categorical remedies, whether relating to seizure or not, and it is not to be assumed that Rule 64 intended so to confine these powers. Issuance of injunctions is governed and regulated by Rule 65 and the preliminary injunction in this case was sought and issued in accordance with this Rule.

If, as petitioners contend, Rule 64 limits the injunctive powers of district courts, it equally limits these powers when a court, pursuant to Rule 66, appoints a receiver to administer the estate of a debtor. It is familiar practice in receivership proceedings to issue an injunction restraining the defendant from disposing of his assets. It certainly would be a novel view that this constitutes an attachment and that it is therefore governed by Rule 64 and is permissible only within the limits within which attachment may issue under the law of the State in which the federal court is located.

But if New York law did control, by force of Rule 64, the grant of the injunction issued in this case, it would be not the law provided by the State attachment statutes (New York Civil Practice Act, §§ 902–973) but that provided by the injunction statutes (*ibid.*, §§ 876–901). Section 878 authorizes injunctions where, during the pendency of the action, defendant is violating or about to

violate plaintiff's rights or is removing or about to remove his property with intent to defraud the plaintiff. Section 877 authorizes issuance of injunctions "restraining the commission * * * of an act, the commission * * * of which during the pendency of the action would produce injury to the plaintiff." It is under the injunction statutes and not the attachment statutes that the New York courts exercise power to issue injunctions restraining defendant's removal or disposition of his assets. *Bronx County Trust Co.* v. *O'Connor*, 220 App. Div. 340 (1927); *Maine Products Co.* v. *Alexander*, 115 App. Div. 112 (1906); cf. *Bachman* v. *Harrington*, 184 N. Y. 458, 462 (1906).

The broad terms of the New York injunction statutes are ample basis for the power to enjoin as done in this case. The New York courts have used the injunctive power provided in § 878 for a comparable purpose. *Smith* v. *Bradlee*, 37 N. Y. S. 2d 512, 518–519 (1942).[12] The injunc-

[12] The decisions in New York cited by petitioners as denying injunctions did not deny the power to grant the relief sought but turned upon the absence in those cases of sufficient ground for granting the injunctive relief sought. These cases are *Wright Co.* v. *Aero Corp., Ltd.*, 128 N. Y. S. 726 (1911); *Campbell* v. *Ernest*, 64 Hun. 188 (1892); *Guth* v. *Groves* 44 F. Supp. 851 (S. D. N. Y., 1942); *Hunnewell* v. *N. Y. Central & H. R. R. Co.*, 196 Fed. 543 (C. C. S. D. N. Y., 1911); *Platt* v. *Elias*, 101 App. Div. 518 (1905). The case last cited was not followed in *Bronx County Trust Co.* v. *O'Connor*, *supra*, where an injunction was granted because the equities required it.

tion in this case may issue under the New York statute if New York law controls, as it otherwise may issue in the exercise of the court's own equity powers.

3. Petitioners in No. 1189 contend that the district court lacked power to issue the injunction until it had satisfied itself of its jurisdiction over them (Pet. 18.)[12] That court was of the opinion the question was not presented by the motion for preliminary injunction and postponed its consideration (R. 98, 100). We believe the district court was correct and it was entitled to issue an injunction protecting its jurisdiction prior to a determination of that issue. Cf. *United States* v. *Shipp*, 203 U. S. 563.

The facts of this case illustrate the appropriateness of such power in the interest of effective administration of justice. The petitioners had, prior to the hearing on the motion for preliminary injunction, moved to quash service of process upon them. No affidavit in support of the motion had been filed and the motion had not been noticed for hearing. Subsequent to the hearing on the motion for injunction, the Government filed an extensive affidavit in support of the allegations in its verified complaint that petitioners were doing business and could be found within

[12] Petitioners in No. 1190 do not make this contention. In the court below they urged postponement of a decision of the question of jurisdiction (R. 56, 62–67, 92).

the jurisdiction of the court (R. 6, 54).[14] Petitioners filed counter affidavits which controverted facts contained in the Government's affidavit. Under the practice prevailing in the court below the matter under such circumstances is referred to a Master to take testimony. The determination of this issue will require the analysis and evaluation by the Master and the court of numerous transactions and acts carried out in this country. If the issuance of the preliminary injunction was required to await this determination, the court could only have continued the restraining order, which would have imposed in the interim an identical restraint upon petitioners, or have terminated the restraining order, which would have deprived the Government of its remedy.

If this Court should hold the jurisdictional question must be decided prior to the entry of the preliminary injunction, a reversal of the order of the district court should continue in effect the temporary restraining order until the question

[14] This affidavit was filed prior to the decision on the motion for injunction in response to the request of the court, made at the hearing, to be informed whether there were in fact substantial grounds for the allegations of jurisdiction contained in the complaint. It stated facts going far beyond those this Court has held sufficient to support a finding of jurisdiction. *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335; *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 583; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, 254; *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218.

of jurisdiction is determined. *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67.

4. Petitioners in No. 1189 appear to contend that the district court was without power to issue the injunction because the complaint fails to state a cause of action (Pet. 18). While we believe that the question presented to the court by the motion for a preliminary injunction was whether the complaint raised serious questions under the Sherman and Wilson Tariff Acts (*Mayo* v. *Canning Co.*, 309 U. S. 310), it is not necessary to decide this question since it is clear that the complaint alleges a valid cause of action. It sets forth a combination by those controlling 95% of the total world production to restrain the import trade of the United States in gem and industrial diamonds and to maintain high prices for diamonds in this country. It alleges that the combination has had this as its primary purpose and its effect and that it has been carried out and made operative within the United States by numerous acts in furtherance thereof performed within this country. Such a combination violates the Sherman Act. *United States* v. *Pacific & Arctic Ry. & Navigation Co.*, 228 U. S. 87; *Thomsen* v. *Cayser*, 243 U. S. 66; *United States* v. *Sisal Sales Corp.*, 274 U. S. 268; *United States* v. *Aluminum Co. of America* (C. C. A. 2), No. 144, October Term 1944, decided March 12, 1945, pp. 1246–50.

B. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO ISSUE THE INJUNCTION SINCE IT WAS REQUIRED TO PROTECT PLAINTIFF FROM IRREPARABLE INJURY THROUGH LOSS OF THE RIGHT TO EFFECTIVE RELIEF AND ITS INCONVENIENCE TO DEFENDANTS WAS SLIGHT

The district court adopted as its findings of fact the facts alleged in the complaint (R. 98, 100) and in addition found, as it stated in the order granting the preliminary injunction. (R. 100)

> * * * that defendants are foreign corporations and they could quickly withdraw their assets from the United States before the entry of a final decree in this cause; that if the preliminary injunction were denied, they would in all probability do so, ... which event, if the Government should succeed in establishing its cause, there would be no way to enforce the decree of the Court; and that the resulting damage to the Government would be incomparably greater than any damage to the corporate defendants if the preliminary injunction were granted; * * *

These findings are amply supported by the facts. Petitioners produce approximately 95% of the world production of diamonds (R. 11). Their principal market is in the United States (*ibid*). They have combined for the primary purpose of maintaining prices in this country (R. 21–22) and the effect of their combination is to maintain exorbitant prices and afford them extravagant

profit (R. 25). Petitioners have endeavored to conduct their businesses in such a way as to avoid subjecting themselves to the jurisdiction of the courts of the United States (R. 33). They are foreign corporations (R. 6–8). Their important officers reside abroad (R. 54, 58, 60). Substantially all of their assets are abroad (R. 54, 58, 61). Their assets in this country consist of bank accounts and personal property which could readily be removed. Petitioners owe no allegiance to our laws and a decree entered by the court could not be enforced outside the United States since, as a practical matter at least, the cause of action is not transitory. Under these circumstances extreme credulity would be required to assume that they would voluntarily obey a decree which would destroy their monopoly in the United States and would not quickly withdraw their assets from this country to prevent its enforcement.

The injunction does not apply to assets which the defendants may bring into this country subsequent to the date of the injunction. Any inconvenience or burden which the injunction may cause the defendants can be mitigated by a bond. Petitioners have not attempted to show that the cost of furnishing a bond would work any hardship upon them. That resulting damage to the Government would be incomparably greater if the injunction were denied than any damage to the corporate defendants if the preliminary injunction were granted is certain.

The issuance of the injunction on these findings was warranted by the decisions of this Court. *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, 50, 51; *Ohio Oil Co.* v. *Conway*, 279 U. S. 813. In the latter case the Court said (p. 815):

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

## CONCLUSION

For the reasons stated, the writs of certiorari should be dismissed. If, however, the Court should determine otherwise, we submit that the order under review should be affirmed.

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# SUPREME COURT OF THE UNITED STATES.

Nos. 1189, 1190.—October Term, 1944.

De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd., Petitioners,

1189 *vs.*

United States of America.

Societe Internationale Forestiere et Miniere du Congo and Companhia de Diamantes de Angola, Petitioners,

1190 *vs.*

United States of America.

On Writs of Certiorari to the District Court of the United States for the Southern District of New York.

[May 21, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases come before the court on petitions for certiorari presented pursuant to § 262 of the Judicial Code.[1] Each petition is by several of the defendants in a single suit pending in the District Court.

Two matters are presented: the propriety of review of the action below by certiorari, and the alleged excess of jurisdiction by the court below in making the order of which the petitioners complain. An understanding of the issues requires a statement of the nature of the suit and of the order made.

The United States filed a complaint in the District Court against the three petitioners in No. 1189, which are corporations organized under the laws of South Africa; the petitioners in No. 1190, which are respectively corporations organized under the laws of the Belgian Congo and under the laws of Portugal; and four other corporations, one organized under the laws of Belgium, one under the laws of the Belgian Congo, and two under the laws of the United Kingdom of Great Britain and Northern Ireland, and seven individuals respectively characterized as stockholder, or stockholder and director, or stockholder and employee, or man-

[1] 28 U. S. C. § 377.

aging agent, or managing director of one or more of the corporations. The complaint sought equitable relief based upon a charge that the defendants were engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds, in violation of §§ 1 and 2 of the Sherman Act[2] and § 73 of the Wilson Tariff Act.[3] The complaint alleged that all of the corporate defendants were doing business within the United States.

With the complaint the United States filed a motion for a preliminary injunction in which it prayed that all of the corporate defendants be restrained from withdrawing from the country any property located in the United States, and from selling, transferring or disposing of any property in the United States "until such time as this Court shall have determined the issues of this case and defendant corporations shall have complied with its orders." The reason given in support of the motion was:

"The injury to the United States of America from the withdrawal of said deposits, diamonds or other property would be irreparable because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants. The principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this Court may render."

Amongst other supporting papers was an affidavit by counsel for the United States which stated that "the investigation which he has made shows the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases."

There was also a motion for a restraining order without notice. The requested restraining order was issued and served on a number of banks; one, a bank in which de Beers had, the same day, established a credit of $59,320; others in which Forestiere had credits of approximately $632,000. Bank credits of petitioner Diamantes affected aggregate approximately $47,000. Both the two last named petitioners had purchased machinery and sup-

[2] 26 Stat. 209 as amended 15 U. S. C. §§ 1, 2.
[3] 28 Stat. 570 as amended 15 U. S. C. § 8.

plies in the United States of an approximate value of $100,000, which were covered by the injunction. Upon a showing that as the corporate defendants were foreign corporations and would be required to obtain information and affidavits in support of their contention that service of process in the suit had not been made upon them, and in support of other motions addressed to failure to state a cause of action under the statutes, time to plead or answer was extended, and the injunction was from time to time modified and continued. Counsel for the petitioners, appearing specially, moved for dissolution of the injunction. The case was heard on affidavits and oral argument, the application was denied, and the injunction was continued in force. Thereupon the petitioners applied to this court for certiorari under § 262. That section provides in part:

"The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

All the petitioners attack the order as in substance a sequestration of property beyond the power of the court and an abuse of discretion in the circumstances. The petitioners in No. 1189 also seek a reversal on the ground that the complaint does not state a claim cognizable by United States courts and that the affidavits filed by these petitioners establish that the court below has no jurisdiction over the persons of the defendants. It is obvious from the record that these contentions are still open in the court below and that court has not yet passed upon them. In the view we take of the case it is unnecessary for us presently to consider them.

In *United States Alkali Export Association, Inc., et al.* v. *United States*, and *California Alkali Export Association, et al.* v. *United States*, Nos. 1016 and 1017 of this term, the court has discussed the propriety of review under § 262 in a suit brought under the Anti-Trust laws where there is a substantial question whether the District Court has jurisdiction of a suit which it has retained for trial on the merits. What is there said applies in this instance. If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period after its termination, and if the order was beyond the powers conferred upon the court, it is plain, under the decisions

mentioned, that the petitions present an appropriate case for the exercise of our jurisdiction under § 262. As hereafter noted the order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262 it can never be corrected if beyond the power of the court below.[4] When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262. We proceed, therefore, to inquire whether the District Court is empowered to enter the order under attack.

Although the Government based its motion upon the theory that the entry of the requested injunction would amount to a sequestration of the defendants' assets, and so argued in the court below, it has abandoned that position, because Rule 70 of the Rules of Civil Procedure,[5] which permits the issue of a writ of attachment or sequestration against the property of a disobedient party to compel satisfaction of a judgment, is operative only after a judgment is entered.

The Government disclaims any benefit of Rule 64, which provides for an attachment at the commencement of, or during the course of, an action for the purpose of securing payment of any judgment ultimately obtained, under and in accordance with the law of the state in which the court sits or under any existing federal statute. It is admitted that there is no applicable federal statute and that under the law of New York, an attachment may issue only in an action seeking a money judgment and will not issue in an equity suit such as the instant one.[6]

The court below deduced the power to grant the injunction from § 4 of the Sherman Act[7] and from § 262 of the Judicial

[4] See In re Chetwood, 165 U. S. 443, 462; Maryland v. Soper, 270 U. S. 9, 30.

[5] 28 U. S. C. foll. § 723c.

[6] N. Y. Civil Practice Act § 902; 7 Carmody, New York Practice, § 309; Thorington v. Merrick, 101 N. Y. 5; Brown v. The Chaminade, 176 Misc. 238; Avery v. Avery, 119 App. Div. 698. Compare Lazenby v. Codman, 28 F. Supp. 949; Shiel v. Patrick, 59 Fed. 962.

[7] 15 U. S. C. § 4.

Code, the section under which petitioners seek review in this court. The respondent seeks to sustain the injunction under the same statutory provisions.

Section 4 of the Sherman Act confers jurisdiction on District Courts "to prevent and restrain violations of this act." That jurisdiction, as we have held,[8] is to be exercised according to the general principles which govern the granting of equitable relief. Since it confers no new or different power than those traditionally exercised by courts of equity, we are remitted to examination of the practice of such courts, unless § 262 has enlarged those powers. That section empowers District Courts to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. It turns out, therefore, that we are again remitted to an inquiry as to what is the usage, and what are the principles of equity applicable in such a case.

Preliminary to a discussion of the course of decision in chancery it will be well to note exactly what is the substance of the injunction, since the name given to the process is not determinative. In truth the purpose and effect of the injunction is to provide security for performance of a future order which may be entered by the court. Its issue presupposes or assumes the following things: (1) that the court has obtained jurisdiction of the persons of the defendants; (2) that it may be found and adjudged that the United States has stated a cause of action in its complaint; (3) that a decree may be entered after trial on the merits enjoining and restraining the defendants from certain future conduct; (4) that the defendants may disobey the decree entered; (5) that a proceeding may be instituted for contempt and will result adversely to the defendants; (6) that a fine may be imposed; (7) that the defendants may neglect or refuse to pay the fine; (8) that an execution issued for the collection of the fine pursuant to 18 U. S. C. 569 may be ineffectual to seize property or money of the defendants in liquidation of the fine, unless the moneys and properties covered by the injunction are held to await the event.

Under the Sherman Act and the Wilson Tariff Act, the District Court has no jurisdiction in this suit to enter a money judgment. Its only power is to restrain the future continuance of actions or conduct intended to monopolize or restrain commerce. It, of

[8] Appalachian Coals Inc. v. United States, 288 U. S. 344, 377.

course, has the power, pending final action in this respect, to restrain action or conduct violative of the statute. A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit. It deals with property which in no circumstances can be dealt with in any final injunction that may be entered. It is not a form of seizure of property used in offending against the statute for the property is not such as might be seized under § 6 of the Sherman Act,[9] or under § 76 of the Wilson Act,[10] and the complaint and affidavits do not purport so to charge. This process is, and can only be, sustained as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt.

The parties agree that neither of them can find any decision or text book authority for the requisition of such security on the footing of a complaint in equity. The respondent refers us to certain cases as analogous but, upon examination, they are all found to be cases in which an interlocutory injunction was granted with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause,[11] or against action which would ultimately have been subject to injunction by final decree.[12] The Government also refers us to cases where federal courts have enjoined interference with their jurisdiction.[13] Thus it argues that a court of equity has inherent power to protect its jurisdiction. The fallacy in the application of the principle here is that, if service of the defendants is properly obtained, and if the complaint states a cause of action, no one questions the jurisdiction of the District Court to enter an appropriate injunction against future conduct violative of the

[9] 15 U. S. C. § 6.

[10] 15 U. S. C. § 11.

[11] Deckert v. Independence Corp., 311 U. S. 282.

[12] Looney v. Eastern Texas R. R. Co., 247 U. S. 214; Ohio Oil Co. v. Conway, 279 U. S. 813; Virginia Railway v. System Federation, 300 U. S. 515; Gibbs v. Buck, 307 U. S. 66.

[13] This power has often been exercised in cases where a court of equity has first taken jurisdiction of a *res* and where some other court has thereafter essayed to deal with that *res*. See, e.g. Wabash R. Co. v. Adelbert College, 208 U. S. 38, 45; Palmer v. Texas, 212 U. S. 118, 129, 130; Princess Lida v. Thompson, 305 U. S. 456, 467.

Anti-Trust Acts. The injunction here granted cannot aid or protect this exercise of its powers, and is not intended to do so.

Federal and State courts appear consistently to have refused relief of the nature here sought.[14] The Government nevertheless urges that equity should extend its jurisdiction for the purpose envisaged in the issue of the injunction and advances several reasons in support of its position. It suggests that, by analogy to the practice of issuing writs *ne exeat*,[15] the court, if it would restrain, by such a writ, an individual defendant in a similar case, should restrain the removal of the property of a corporate defendant from the jurisdiction. The analogy is not a helpful one, for the writ *ne exeat* would not be issued in a case of this sort where the defendant presently owes no debt to the complainant nor is under any fixed duty by reason of the receipt of moneys to account to the complainant therefor.[16]

The Government urges that the supposed hardship imposed upon the defendants by the entry of the injunction is exaggerated; that, by giving a bond, the defendants could release their moneys and property. To this there are several sufficient answers. If the court is without jurisdiction to demand security under the circumstances presented it is equally without authority to compel the proffer of a bond by the seizure of property. If the process be justified in the present posture of the case there is nothing to prevent other and further seizures of property or money brought into the United States in connection with transactions unrelated to any supposed violation of the Anti-Trust laws. Moreover, the very indefiniteness of the obligation, the remoteness of any possible exoneration of the surety, and the citizenship of the defendants would, as common experience tells us, require the posting of collateral with any bondsman, which would, in effect, tie up assets of value equal to that of those frozen by the injunction.

To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be dis-

[14] Martin v. Berry Sons' Co., 83 F. 2d 857; Cities Service Co. v. McDowell, 13 Del. Ch. 109; Wahlgren v. Bausch & Lomb Optical Co., 77 F. 2d 121; Campbell v. Ernest, 19 N. Y. Supp. 123; Platt v. Elias, 101 App. Div. (N. Y.) 518; Maine v. Alexander, 115 App. Div. (N. Y.) 112; Golden v. Tauster, 125 N. Y. Supp. 83; Wright Co. v. Aero Corp., 128 N. Y. Supp. 726; Broadfoot v. Miller, 174 N. Y. Supp. 497; compare Gordon v. Washington, 295 U. S. 30, 37.

[15] See 28 U. S. C. § 376.

[16] Ginsberg & Sons v. Popkin, 285 U. S. 204, 208.

tinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

We are of opinion that the injunction issued in this case is not authorized either by statute or by the usages of equity and that the decree granting the injunction should be reversed.

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Mr. Justice DOUGLAS, with whom Mr. Justice BLACK, Mr. Justice MURPHY and Mr. Justice RUTLEDGE concur, dissenting.

I think the writ should be dismissed. For I do not think this is a proper case in which to exercise our jurisdiction under § 262 of the Judicial Code, 28 U. S. C. § 377.

Our jurisdiction under § 262 has been fully reviewed by the Chief Justice in *U. S. Alkali Export Ass'n Inc. v. United States*, decided this day. I agree that the exercise of our extraordinary jurisdiction was appropriate in that case. For the question presented not only went to the jurisdiction of the District Court to entertain the suit. If the defendants in that suit were right in their contention, a trial on the merits would have frustrated the statutory scheme which Congress had designed for the control of anti-trust activities.

But there is no such extraordinary situation presented here. This is precisely the kind of decree which Congress by the Expediting Act of February 11, 1903, as amended, 15 U. S. C. § 29, intended should not be brought here for review. With reference to the change made by that Act, Mr. Justice Brandeis speaking for the Court in *United States v. California Cooperative Canneries*, 279 U. S. 553, 558, said: "These provisions governing ap-

peals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

To allow this appeal is to defeat that policy. Long ago in *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569, Chief Justice Marshall stated that an allowance of an appeal from an interlocutory ruling where Congress permitted an appeal only from a final judgment would be a "plain evasion" of the Act of Congress. We made a like ruling only recently in *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 30, where we said: "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases."

The present case presents no issue which warrants a departure from that long settled practice. This case raises no question of grave public importance. It is by no means comparable to *Ex parte United States*, 287 U. S. 241, where the interlocutory decree was equivalent to a denial of the absolute right of the government to put the accused on trial. It is wholly unlike the cases cited in *U. S. Alkali Export Ass'n Inc.* v. *United States*, *supra*, where writs were issued under § 262, to review interlocutory orders which foreclosed the adjudication of rights entrusted to the jurisdiction of a state tribunal or which deprived a party of his basic right of trial by jury. The public importance of the present question is not apparent. The actual hardship imposed upon the defendants is no more than the cost of procuring a bond. It has always been assumed that mere hardship or inconvenience alone was not sufficient to justify resort to the extraordinary course of review by way of § 262. *U. S. Alkali Export Ass'n Inc.* v. *United States*, *supra*. Is the inconvenience of private litigants to be the newly found ground for evading the Expediting Act?

The reason advanced for departing from the long standing practice is that "the order was beyond the powers conferred upon

"the court." By that test every interlocutory order which is wrong can be reviewed here under § 262. That is novel doctrine. That seems to be the test for the Court says that the order can now be reviewed because it involves "a matter lying wholly outside the issues in the case." In other words, we look to the merits and take the case under § 262 if it appears that the District Court exceeded its authority. But it always exceeds its authority when it abuses its discretion. Thus we must now entertain these appeals on interlocutory orders, though Congress said we should not, in order to determine whether the District Court kept within bounds. Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable. It did not draw the distinction now suggested between interlocutory orders which are an abuse of conceded judicial power and interlocutory orders which otherwise exceed judicial authority. Congress moreover knew that if immediate review of interlocutory orders could not be had, no decision on the merits might be able to "redress any injury done by the order". But that was the choice which it made. We should respect it.

The decision, if followed, will open the flood gates to review of interlocutory decrees. It circumvents the policy of Congress to restrict review in these cases to final judgments.